Supreme Court, U.S.
F I L E

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRUCE RICHARD TOSKI,

Petitioner,

v.

WILLIAM J. MCDONNELL
KENDALL G. WILLIAMS
JEFFERSON H. HENRY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bruce Richard Toski - *Petitioner pro se*
2361 S.W. 36th Terrace
Fort Lauderdale, FL 33312-4291
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84 pp

QUESTION PRESENTED

Whether the District Court erred by applying the narrow test for preemption articulated in *Andrews v. Louisville & N.R. Co., 406 U.S. 320 (1972)*, to find that all eight (8) of petitioner's claims were preempted by the Railway Labor Act ("RLA"), 45 U.S.C. § 151 et seq., contrary to the plain language and intent of the RLA and the unanimous decision of the United States Supreme Court in *Hawaiian Airlines, Inc. V. Grant T. Norris (No. 92-2058), 512 U.S. ___, 129 Le.Ed.2d 203, 114 S.Ct 2239 (1994).*

PARTIES TO THE PROCEEDING

1. Anania, Francis A. - Counsel for respondents
2. Blackwell, Donald A. - Counsel for respondents
3. Davis, Edward B. - United States District Court Judge
4. Eastern Air Lines, Inc. - Assisted counsel for respondents
5. Friedman, Jonathan S. - Counsel *pro hac vice* for petitioner at the U.S. Court of Appeals
6. Henry, Jefferson H. - Respondent
7. Hite, M. Catherine - Counsel for respondents
8. McDonnell, William J. - Respondent
9. O'Brien, Richard F. - Counsel for respondents
10. Toski, Bruce Richard - Petitioner
11. Turnoff, William C. - U.S. District Court Magistrate
12. Williams, Kendall G. - Respondent

OPINIONS BELOW

Magistrate's Report re: Summary Judgment .....Appendix 67a
Judge Davis Order adopting Magistrate's Report .... Appendix 21a
Eleventh Circuit Court of Appeals Order affirming lower court decision..... Appendix 25a

JURISDICTION

Petitioner *pro-se*, filed suit against the respondents in Dade County Circuit Court under Case #90-51972-CA-01 (Appendix 1a) on October 23, 1990. The case was removed to federal court based on partial reference to federal labor law in Count IV. Plaintiff's nine (9) count complaint survived a Motion to Dismiss with the court only striking Count VIII and part of Count I (R. 1-21)[1]. Four years later, after denying the petitioner (1) an opportunity to amend his initial complaint (R. 6-168), and (2) oral argument, the district court issued an Order (Appendix 21a) granting the respondents' motion for summary judgment (R. 4-97) on January 31, 1994.

Appellant filed a timely appeal (R. 6-180) (Appendix 23a) to the Eleventh Circuit Court of Appeals on February 25, 1994. On December 10th, 1996, the U.S. Court of Appeals for the Eleventh Circuit affirmed (Appendix 25a) the lower court's decision.

On December 30, 1996, petitioner filed a suggestion for a rehearing en banc (Appendix 27a). The Court of Appeals for the Eleventh Circuit denied (Appendix 37a) this suggestion on February 26, 1997. Petitioner herein filed a Petition for Writ of Certiorari within the 90 day period specified in 28 U.S.C. § 2101(c). On June 5th, 1997 the clerk of this Court responded to said petition and allowed the petitioner 60 days to make necessary corrections.

This Court has jurisdiction to review this judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

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[1] References to the record. The first number is the volume #, the second number is the docket entry.

STATUTES & CONSTITUTIONAL PROVISIONS

AMENDMENT [VII.] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States , than according to the rules of the common law."

AMENDMENT [V.] "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

RAILWAY LABOR ACT The pertinent sections of the Railway Labor Act (RLA) 45 U.S.C. §151, *et seq.* are reproduced at Appendix 39a.

28 U.S.C. § 2101(c) "Any other appeal or any writ or certiorary intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree."

28 U.S.C. § 1254(1) "Cases on the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree..."

STATEMENT OF THE CASE

A. *Facts*. Petitioner Bruce Richard Toski was hired on as a shop laborer at Eastern Air Lines (EAL) on June 22, 1976. Subsequently, the petitioner joined the International Association of Machinists' union (IAM). In 1980 the petitioner was promoted to stock clerk and then to mechanic in 1984. On October 16, 1986 the second shift Ground Service Equipment (GSE) mechanics elected the petitioner as Shop Steward. The respondents herein, are three airline officers who directed, confirmed or ratified the discharge of the plaintiff from his employment at EAL. The relationship between the petitioner and the respondents was conditioned by federal laws, state laws, common law, and finally by the Collective Bargaining Agreement (CBA) entered into between EAL and the IAM. The CBA was made and

entered into in accordance with the provisions of the Railway Labor Act (*see* Preamble to the CBA). The labor contract was of three years duration, amenable on December 31, 1987 (CBA App. No. 26). Petitioner had fully served the 120 day probationary period specified in Article 7 of the CBA. Employees who had passed the probationary period accrued seniority and could only be discharged "for cause" (CBA Article 15E). Article 18 and 19 of the CBA stated the steps required by both EAL and the IAM in connection with terminations or discharges.

After 10 years meritorious service, the petitioner's employment at EAL was terminated by respondent Williams. This dismissal occurred one (1) day after the petitioner filed a report with the first aid department documenting an incident between respondent McDonnell and the petitioner. Said incident occurred with only two (2) minutes left to go at the end of the shift, when McDonnell attacked the petitioner, *in the men's room*, while attempting to serve him a disciplinary letter.

B. *Proceedings*. The petitioner complied with all of the procedures in Articles 18 and 19 of the CBA to appeal his discharge to the system Board of Adjustment (SBA). However, while petitioner's SBA appeal was pending, EAL , in 1989, filed for bankruptcy and all litigation was stayed by order of the bankruptcy court. Petitioner filed the requisite proof of claims against EAL in the N.Y. District Court. Apart from the EAL litigation, the petitioner filed a complaint (Appendix 1a) in October of 1990 against his former GSE supervisors (respondents) at EAL. EAL *was not* named as a party in this lawsuit. Four (4) years later, in February of 1994, the district court summarily decided - without benefit of oral argument - that the petitioner had no legal basis to a jury trial and granted (Appendix 21a) the respondents' motion for summary judgment. The Eleventh Circuit Court of Appeals affirmed (Appendix 25a) with a short paragraph stating that the petitioners' arguments were "meritless". The opinion refused to address the *on point*, unanimous decision of this Court clearly stated in *Hawaiian*

ines, Inc. V. Grant T. Norris, (No. 92-2058), 512 U.S. ___, 129 Airl.2d 203, 114 S.Ct 2239 (1994)(Appendix 47a) and failed to L.Eain *why* the arguments advanced by the petitioner were expritless".
"m

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit Court of Appeals in the cas *sub-judice* is in direct conflict with several Supreme Court dec sions; *Hawaiian Airlines, Inc. v. Grant T. Norris* (No. 92-2058), 512 U.S.___ , 129 L.Ed.2d 203, 114 S.Ct. 2239 (1994), *Lingle v. Nor ge Div. of Magic Chef, Inc.*, 486 US 399, 108 S.Ct.1877 (1988), and finally *Walker v. Southern Railway Company,* 385 U.S. 196, 87 S. Ct. 365 (1966). Only *Norris* was decided subsequent to the order of the district court that granted summary judgment to the defndants. Although *Lingle* and *Walker* are on point, one only need loo to the learned decision in *Norris* for guidance and finality to prevent a breach of the appellant's substantive right to a trial by jury in the case *sub judice*.

Norris is on point factually and legally. The plaintiff in *Norris* - like the plaintiff herein - was an airline mechanic who was also terminated for alleged insubordination and refusing to perform an unsafe repair. Like the plaintiff herein, Norris appealed his termination to the SBA, and subsequently filed separate actions against the airline and against three (3) airline officers who directed, confirmed or ratified the retaliatory discharge. Like the case at bar, many of Norris's claims were dismissed by the trail court as being preempted by the RLA for alleged failures to exhaust administrative remedies. The Supreme Court of Hawaii reversed both cases, concluding that the RLA did not pre-empt respondent's state tort actions. *Norris v. Finazzo*, 74 Haw. 235, 842 P.2d 634 (1992); *Norris v. Hawaiian Airlines, Inc.*, 74 Haw 648, 847 P.2d 634 (1993). The court pointed to *Lingle* in which the Supreme Court held that a claim of wrongful termination in retaliation for filing a state worker's

compensation claim[2] did not require interpretation of a collective-bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. *Id.* at 407. One year later the Supreme Court affirmed and upheld the decision of the Supreme Court of Hawaii. In a *unanimous* decision the Court held:

> ". . .(W)e agree with the Supreme Court of Hawaii that (Norris's) claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment." *Norris* at 17.

Like Norris, the petitioner's claims are based primarily upon state law. Further, the petitioner's claims, e.g. Battery, Negligent Retention, etc., do not require interpretation of a collective bargaining agreement, but instead depend upon purely factual questions concerning the petitioner's conduct and the respondents' motives.

CONCLUSION

The U.S. Supreme Court has stated unequivocally that the RLA does not displace state legal rules providing substantive protection for employees, and that the RLA does not require extra contractual causes of action be heard by SBAs. For the reasons stated above, the judgment of the Court of Appeals for the Eleventh Circuit should be reversed and remanded.

Respectfully submitted this 1st day of August, 1997.
/s/ Bruce Toski
Bruce Toski - Plaintiff, *pro se*
2361 S.W. 36 Terrace, Fort Lauderdale, FL 33312-4291
Tel: (954) 583-4191

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[2] Petitioner herein was terminated the day after he filed a Worker's Compensation claim with EAL's first aid department.

APPENDIX

ORDERS:

District Court Magistrate Turnoff's Report & Recommendation re: respondents' Motion for Summary Judgment *67a*
District Court Judge Davis' granting of the respondents' Motion for Summary Judgment 21a
U.S.C.A. (11th) opinion affirming above Order 25a
U.S.C.A. (11th) Order denying petition for rehearing 37a

STATUTES:

Railway Labor Act (RLA) 45 U.S.C. §151, et seq. 39a

OPINIONS RELEVANT TO THIS CASE:

Hawaiian Airlines, Inc. V. Grant T. Norris (No. 92-2058), 512 U.S. ___, 129 Le.Ed.2d 203, 114 S.Ct 2239 (1994) 47a

OTHER RELEVANT MATERIAL:

Original Complaint filed in Circuit Court 1a
Notice of Appeal to the Eleventh Circuit Court of Appeals 23a
Suggestion for Rehearing En Banc 27a

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

BRUCE RICHARD TOSKI,

Plaintiff,

CASE NO. 90 - 51972
JUDGE: ROBINSON

vs.

A JURY TRIAL IS DEMANDED

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY,
and
KENDALL G. WILLIAMS,

Defendants.
_____/

COMPLAINT

Plaintiff, BRUCE RICHARD TOSKI, pro se, sues the Defendants, WILLIAM J. MCDONNELL, JEFF HENRY, and KEN WILLIAMS, and alleges:

I. JURISDICTION AND PARTIES

1. The jurisdiction of this court is based on the amount in controversy, which exceeds for each Defendant, exclusive of costs and interest, the sum of $30,000.00.

2. Plaintiff is a student and resident of Broward County, Florida.

3. Plaintiff started working for Eastern Air Lines (hereinafter EAL or the company) on June 22, 1976 as a shop laborer. At the same time the Plaintiff joined the International Association of Machinists and Aerospace Workers (hereinafter IAMAW or the union), which acted as the chief bargaining agent for the Plaintiff in disputes arising out of employment. In 1980 Plaintiff was promoted

to the stock department. On April 24, 1984 Plaintiff was promoted to mechanic at the Ground Service Equipment (hereinafter GSE) shop under the supervision of Defendant HENRY. Plaintiff worked in the GSE shop until he was terminated by Defendant WILLIAMS on November 7, 1986.

4. Defendant, WILLIAM J. MCDONNELL, is a resident of Broward County, who was employed as Plaintiff's supervisor at EASTERN AIR LINES in Dade County, Florida.

5. Defendant, JEFF HENRY, is a resident of Broward County, who was employed as Plaintiff's foreman, and later as Plaintiff's general foreman at EASTERN AIR LINES in Dade County, Florida.

6. Defendant, KEN WILLIAMS, is a resident of Broward County, who was employed as Plaintiff's manager at EASTERN AIR LINES in Dade County, Florida.

7. The incidents complained of in this lawsuit all took place in Dade County, Florida.

8. The "Agreement" referred to in this complaint is incorporated by reference as "Exhibit A". The "Agreement" was made and entered into in accordance with the provisions of the Railway Labor Act, by and between EAL and the IAMAW. The purpose of the "Agreement" was basically to cover working conditions and disputes between EAL employees who are members of the IAMAW.

9. This court has jurisdiction over the claims herein, because, the grievance procedure governed by Articles 17-19 of the Agreement is no longer controlling or in effect. On the date of the filing of this lawsuit, Plaintiff and the IAMAW were still on strike against EAL. Arbitration has ceased to exist.

II. FACTS

10. On July 31, 1984, HENRY placed a written reprimand in Plaintiff's personnel file without notifying the Plaintiff. MCDONNELL referred to this reprimand in disciplinary letters issued to the Plaintiff dated October 23 and 24, 1986. These letters are incorporated by reference as Exhibit "D".

11. On November 27, 1984, Plaintiff was served a letter for "Job Performance" by Defendant HENRY. This letter concerned work performed by the Plaintiff on a forklift #4649. This letter is incorporated by reference as Exhibit "D".

12. Plaintiff filed a grievance to have the above letter removed from his personnel file. On April 12, 1988 the System Board of Adjustment (hereinafter SBA) convened to hear the grievance.

13. At the hearing above, WILLIAMS refused to produce the Ground Support Equipment Work Order (hereinafter GEARS) which documented work done by the Plaintiff on forklift #4649. (A copy of the applicable pages from the transcript of the hearing is incorporated by reference as Exhibit "E").

14. As a direct result of the Defendants' failure to produce the GEARS for the vehicle in dispute, the Plaintiff was unable to refute certain false statements made by the Defendants at the April 12, 1988 arbitration hearing.

15. On or around March of 1985 Plaintiff asked MCDONNELL, who was a union shop steward at the time, about the unavailability of a special socket needed to repair tractor axles, which Defendant Henry refused to obtain for shop use. (GSE parts request is incorporated by reference as Exhibit "C"). MCDONNELL told the Plaintiff, "Since everyone else is using a hammer and chisel instead of the special socket to remove the axle nut, you should do the same."

16. On May 7, 1985 Plaintiff filed two Potential Danger Observance Reports (hereinafter PDORs) with HENRY. These two PDORs are incorporated by reference as Exhibit "B"). EAL

encouraged the reporting of safety problems with a large placard, EAL stock part # 14GG0160. (A true sample of this placard is incorporated by reference and attached to Exhibit "B").

17. On May 7, 1985, as a direct result of filing the PDORs, HENRY complained to the GSE shop manager, who threatened the Plaintiff with disciplinary action for filing any more PDORs.

18. The above incident was directly witnessed by six (6) mechanics who worked with the Plaintiff on the third shift.

19. Upon information and belief, a written memo was placed in the Plaintiff's personnel file involving an alleged discussion concerning job performance with the Plaintiff on May 23, 1985. Plaintiff was never counseled in any disciplinary matter by former EAL foreman Mike Sikora and Plaintiff was never informed about the memo placed in his personnel file. MCDONNELL referred to this "discussion" in letters he issued to the Plaintiff dated October 23 and 24, 1986.

20. On or about January 1, 1986, MCDONNELL was promoted from mechanic to foreman.

21. Upon information and belief, MCDONNELL had received very little formal education and received minimal management training prior to his promotion. Soon after his promotion MCDONNELL attended a class titled "Confrontation Management."

22. On February 28, 1986, Plaintiff was served a "Letter of Reprimand" by MCDONNELL because the Plaintiff had been wearing a button stating "Frank is a Weenie." (This letter is incorporated by reference as Exhibit "D".)

23. Defendant MCDONNELL had threatened Plaintiff several times previously with termination if the button was not removed.

24. Plaintiff filed a grievance which was denied first by MCDONNELL and then by MCDONNELL's manager because, "This being the second letter, the grievance is denied."

25. Plaintiff had never been served with the first referenced letter. This letter, written by HENRY was dated February 15, 1985 and concerned the wearing of "a large button" on the Plaintiff's work

uniform. The IAMAW did not receive their copy until April 2, 1986. The Plaintiff did not receive a copy until after he was fired.

26. On or about April 11, 1986 Plaintiff was seated in the break room during lunch with two other mechanics. MCDONNELL entered the room and demanded to see the Plaintiff's flashlight. A few seconds later, MCDONNELL, acting with malicious intent and with alcohol on his breath, lunged at the Plaintiff and wrestled the flashlight from Plaintiff's belt.

27. Later the same day, MCDONNELL refused to allow the Plaintiff to confer with the shop steward about writing a grievance for the incident in ¶ 26. That night MCDONNELL ordered the Plaintiff to go home early.

28. On April 14, 1986, MCDONNELL served a letter of "Discipline" to the Plaintiff concerning work done by the Plaintiff on vehicles #2512 and #5663. (This letter is incorporated by reference as Exhibit "D".)

29. The letter above concerned 1) a diesel vehicle which had an illegal, noisy exhaust system, which the Plaintiff was attempting to repair on April 7, 1986, with improper parts which management had ordered and 2) Plaintiff was reprimanded for attempting to write a grievance with the shop steward about the incident between MCDONNELL and the Plaintiff in ¶ 26.

30. Upon information and belief, writing a grievance on company time was a common practice before MCDONNELL became the foreman in the GSE shop. While MCDONNELL was a shop steward he often wrote grievances on company time and/or used company time for union business.

31. Upon information and belief MCDONNELL removed the GEARS for the vehicles #2512 and #5663 from the filing cabinet where they were regularly stored. Plaintiff requested copies of the GEARS from MCDONNELL. MCDONNELL never produced copies for the Plaintiff and refused to allow Plaintiff to copy same.

32. On or about June 22, 1986, Defendant MCDONNELL, assigned two workers on overtime from day shift, to road-call duty

on second shift.

33. The assignment of workers to their jobs by MCDONNELL instead of by the lead man was a violation of past practice and Article 4B of the "Agreement" between the IAMAW and EAL.

34. MCDONNELL over-rode the lead man's objection and said, "Go file a grievance. I am going to keep Hyrtzay and Delgado on road call duty". Hyrtzay was a neighbor of MCDONNELL. This act by MCDONNELL prevented the Plaintiff from being assigned to road-call duty. Road-call duty was generally recognized as one of the better assignments in the GSE shop.

35. As a result of Plaintiff filing a grievance concerning the above incident, Jose Posadas (manager at that time of the GSE shop) issued a letter to MCDONNELL instructing him that, all mechanics will receive their assignments by the Lead Mechanic and not by the foreman on duty.

36. On or around July 16, 1986, MCDONNELL applied for an honorary withdrawal card from the IAMAW.

37. Plaintiff circulated a petition which was signed by twenty two (22) other mechanics, which stated in essence, that, because MCDONNELL was a very weak and ineffective shop steward and an even worse example of leadership as a foreman, he should be denied his honorary union withdrawal card.

38. MCDONNELL's application for honorary withdrawal was rejected by the membership of the IAMAW.

39. Following the rejection, MCDONNELL told several of Plaintiff's co-workers that he, (MCDONNELL), was a vindictive person and that he would get even with those people who signed the Plaintiff's petition. (This letter is incorporated by reference as Exhibit "F".)

40. On July 30, 1986 Plaintiff attended training class on his day off. MCDONNELL refused to pay Plaintiff as required under Article 6F(2) of the "Agreement." Plaintiff filed a grievance. Foreman Garner settled the grievance and paid the Plaintiff.

41. During August of 1986 the Plaintiff broke a hammer on the

job. It was standard policy that tools broken on the job would be replaced. Plaintiff gave this broken hammer to MCDONNELL. Two (2) months later Plaintiff questioned MCDONNELL about a replacement. MCDONNELL disavowed any knowledge of the prior conversation or having received the broken hammer. MCDONNELL said he would not get Plaintiff a new one.

42. On or about August 11, 1986, MCDONNELL charged the Plaintiff with being one-minute tardy for work and refused to pay Plaintiff for that one minute.

43. Plaintiff filed a grievance concerning MCDONNELL's refusal to pay Plaintiff for the one minute tardy. In the first step of the grievance HENRY refused to pay Plaintiff for the one minute. In the second step of the grievance, the manager Jose Posadas removed the tardy charged from the attendance roll and paid Plaintiff for the one minute.

44. On August 28, 1986, Plaintiff was served a letter concerning "Time Card Procedures" by HENRY. HENRY also refused to pay the Plaintiff for three hours of training class which the Plaintiff attended. (This letter is incorporated by reference as Exhibit "D".)

45. Plaintiff grieved the above letter. The three hours for attendance at a training class were ordered paid at an arbitration hearing on April 12, 1988.

46. On September 8, 1986, MCDONNELL issued Plaintiff a "Letter of Instruction" for not wearing the EAL uniform properly. (This letter is incorporated by reference as Exhibit "D".)

47. This letter concerned a situation where the Plaintiff was forced to work in the hot sun, in 100 degree weather, in an area out of public view. Plaintiff had removed his sticky, sweaty shirt in an attempt to cool down. MCDONNELL, who never left his air conditioned office, stated to the shop steward Tom Markham, that, the reason he (MCDONNELL) was making a big deal out of a shirt was because he wanted to harass the Plaintiff.

48. On September 10, 1986, after the Plaintiff had punched in to go to a training class - for which he was scheduled to attend -

MCDONNELL ordered the Plaintiff not to go to the class.

49. Plaintiff went to the training class - for which he was scheduled to go - and turned in a time card to be paid for the three hours spent in the training.

50. On September 11, 1986, Plaintiff was served a letter of "Reprimand" by MCDONNELL concerning the incident on September 10, 1986. The letter stated that the Plaintiff had "falsified a claim for pay." (This letter is incorporated by reference as Exhibit "D".) In addition MCDONNELL refused to pay the Plaintiff for the three hours of class.

51. Plaintiff grieved the above letter on October 2, 1986. The arbitrator for the SBA meeting of April 12, 1988 held that the Plaintiff had **not** falsified a claim for pay.

52. Manager Jose Posadas ordered MCDONNELL to stop harassing the Plaintiff in September, 1986. This directive came after a meeting between the Plaintiff and Jose Posadas in September, 1986, wherein the Plaintiff requested relief from the constant harassment of Defendant MCDONNELL.

53. On October 1, 1986, Jose Posadas was reassigned to Terminal Aircraft Line Maintenance.

54. Upon information and belief, Ken Williams was to replace Jose Posadas as the manager for the GSE shop. However, Defendant Williams would not arrive to take control of the GSE shop until Monday, November 3, 1986. In the meantime Jose Posadas was still presiding over both areas.

55. On October 16, 1986, Plaintiff was elected Shop Steward for the second shift GSE shop at the terminal.

56. On October 23, 1986, Plaintiff was served a letter of "Reprimand" and a letter concerning "Job Performance" and ordered to take five days off without pay by MCDONNELL. (These letters are incorporated by reference as Exhibit "D".)

57. On October 23, 1986, MCDONNELL twice refused Plaintiff's request to go on union business.

58. The next day, Plaintiff telephoned manager Jose Posadas and

asked him why he allowed MCDONNELL to give out another letter and time off to the Plaintiff.

59. Jose Posadas said that he was not even aware of the disciplinary actions by MCDONNELL and ordered MCDONNELL to rescind the "Job Performance" letter and the days off.

60. Plaintiff grieved the letter of "Reprimand" on October 24, 1986. The arbitrator at the SBA on April 12, 1988 ordered the letter removed from the Plaintiff's personnel file.

61. On October 24, 1986, Defendant MCDONNELL attempted to serve a letter concerning "Job Performance" on the Plaintiff in the bathroom, at 11:18 P.M., two minutes before punch out time.

62. At 11:18 P.M. on October 24, 1986, MCDONNELL followed the Plaintiff into the mens' bathroom. As Plaintiff was closing the door to the stall, MCDONNELL pushed on the door with intentional force sufficient to knock down the Plaintiff over the commode. As the Plaintiff stood up, MCDONNELL said, "Here, take your damn letter now!", and shoved the letter into the Plaintiff's breast pocket. MCDONNELL was shouting in Plaintiff's face and Plaintiff smelled the strong odor of alcohol on MCDONNELL's breath. Plaintiff reacted by trying to push MCDONNELL away. MCDONNELL thrust the Plaintiff backwards into the stall again. Plaintiff threw the letter out the door of the bathroom after MCDONNELL exited.

63. Defendant then picked up the letter off the floor and went to the Plaintiff's valise near the time clock. MCDONNELL then opened Plaintiff's valise and placed the letter inside.

64. Defendant MCDONNELL got into his work truck, left, then came back, stopped, got out, and went back to Plaintiff's valise, opened it, and removed the letter.

65. Shortly after 11:20 P.M., in the foreman's office, the Plaintiff was served the letter concerning "Job Performance" by MCDONNELL. (This letter is incorporated herein as Exhibit "D").

66. On October 28, 1986, HENRY telephoned Plaintiff at Plaintiff's home on Plaintiff's day off and apologized for

MCDONNELL's attack. HENRY asked the Plaintiff what he could do to appease the situation. Plaintiff replied that Henry should; 1) remove all disciplinary letters from Plaintiff's personnel file, 2) have MCDONNELL write a letter of apology, 3) pay Plaintiff for the one day not paid due to issuance of the April 14, 1986 letter by MCDONNELL, and 4) remove MCDONNELL from the second shift so that he would not come into further contact with the Plaintiff.

67. On October 30, 1986, MCDONNELL served every worker in the shop, except the Plaintiff, with a letter for alleged violation of break time limits.

68. Early in the shift on October 31, 1986, HENRY asked the Plaintiff to come into the office to "work things out man to man."

69. HENRY refused to allow the Plaintiff to tape record the conversation that followed. HENRY apologized for MCDONNELL'S actions but said that he could not discipline MCDONNELL, that such action would have to come from Defendant WILLIAMS, who would be the new manager of the GSE shop on November 3, 1986. Plaintiff then requested that Henry set up a meeting between the Plaintiff and Defendant Williams. HENRY promised to set up such a meeting for November 3, 1986.

70. On November 3, 1986, Plaintiff attended a meeting with Defendant Williams, to discuss the attack on the Plaintiff by MCDONNELL. WILLIAMS told the Plaintiff that he would make a decision concerning MCDONNELL after he (WILLIAMS) had talked with Jose Posadas. **In fact** WILLIAMS never contacted Jose Posadas to discuss the incident.

71. On November 6, 1986, Plaintiff filled out a written form in the first aid department documenting the attack by Defendant MCDONNELL in the bathroom.

72. On November 7, 1986, WILLIAMS, through Paul Priest of EAL's Labor Relations Department, requested a cursory medical examination of the Plaintiff by Eastern's Medical Doctor.

73. On November 7, 1986, Plaintiff was issued a letter by WILLIAMS which stated that the Plaintiff was terminated

immediately for "serious violations of various rules and regulations." (This letter is incorporated by reference as Exhibit "D").

74. When the Plaintiff was led off the property his airport base pass and employee I.D. were confiscated by WILLIAMS.

75. On November 17, 1986, the Plaintiff, in an attempt to avoid another confrontation with MCDONNELL, assigned another shop mechanic of the GSE shop to bring the Plaintiff's tools home. MCDONNELL confiscated a number of Plaintiff's tools before he would allow the Plaintiff's tool boxes to be taken home by Plaintiff's assignee.

76. It was necessary for the Plaintiff (1) to drive to the job situs and (2) call the head of Eastern Air Line's security department before MCDONNELL acquiesced control of the remainder of Plaintiff's tools into Plaintiff's possession.

77. On June 6, 1987, the Plaintiff demanded a base pass from EAL Protective Services. A pass was necessary so that the Plaintiff could return onto the airport property so that Plaintiff could continue to represent the employees that elected him. Plaintiff's request for a pass was denied. The reason given was that the Plaintiff had been terminated by WILLIAMS and would not be allowed back on base.

78. On June 6, 1987, Plaintiff requested a pass from the Metro Dade Aviation Department. The request was denied based on EAL's refusal to grant permission to the Aviation Department.

79. On June 6, 1987, the Plaintiff requested access to the airport property at the Metro Police Department Substation across from the GSE shop in the Miami International Airport. Plaintiff was told that no action would commence without a court order. They advised the Plaintiff that, if he insisted on asserting his rights by forcefully entering EAL's property at the airport, and EAL requested Plaintiff's arrest for trespassing, that in all likelihood they would arrest the Plaintiff.

80. The Plaintiff, through General Chairman Ronald Orr of District 100, on 07/07/87, requested a pass through Mr. John MacDonald of the EAL Personnel Dept. Once again, based on the

termination of the Plaintiff by WILLIAMS the request was denied.

81. At each contact the Plaintiff informed EAL's officers and agents about the RLA and the clear wording of 45 U.S.C. § 152. Most of the replies ran along the lines of, "So what ...take us to court." The most memorable, though, came from Paul Priest who I talked with on 06/23/87 while in the Protective Services office. Paul Priest stated, "It'll be a cold day in hell when I give you a pass."

COUNT I - BATTERY
(AGAINST WILLIAM J. MCDONNELL)

82. Plaintiff re-alleges all preceding paragraphs, and further alleges:

83. Defendant WILLIAM J. MCDONNELL's drunken act of striking Plaintiff during an attempt to serve a disciplinary letter was willful and wanton and constituted a battery upon Plaintiff.

~~84. Defendant WILLIAM J. MCDONNELL's drunken, act of lunging at Plaintiff and grabbing the flashlight from his belt was willful and wanton and constituted a battery upon Plaintiff.~~ (struck by court subsequent to motion for dismissal)

85. In ~~both~~ incidents above Defendant MCDONNELL acted with malicious intent and without the Plaintiff's permission.

86. As a direct and proximate result of MCDONNELL's intentional acts of battery, the Plaintiff suffered, including but not limited to spraining his hip, emotional distress, loss of property, loss of benefits, and lost wages.

87. WHEREFORE, Plaintiff demands judgment against Defendant MCDONNELL for his damages, including the pain and suffering, disability, impairment of his bodily functions, medical expenses, lost earnings and punitive damages.

COUNT II NEGLIGENT RETENTION
(AGAINST JEFF HENRY and KEN WILLIAMS)

88. a. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

89. Defendant MCDONNELL was acting in the course and scope of his employment as Plaintiff's supervisor at the times that he struck and injured the Plaintiff.

90. During all times and incidents complained of heretofore, the Plaintiff was legally on the premises when harassed and/or attacked by MCDONNELL.

91. The Plaintiff came into contact with MCDONNELL as a direct consequence of the employment of MCDONNELL as Plaintiff's supervisor.

92. On occasions prior to and following MCDONNELL's attacks on the Plaintiff, MCDONNELL had demonstrated animus towards Plaintiff. Plaintiff and other persons had given active and/or constructive notice to HENRY and WILLIAMS concerning same.

93. Defendants HENRY and WILLIAMS failed to make a reasonable investigation into Plaintiff's (and others) assertions that MCDONNELL's behavior was hostile, erratic and a danger to the mechanics he was there to supervise.

94. Defendants HENRY and WILLIAMS knew or should have known the impropriety of retaining MCDONNELL in a supervisory position with a coincident high degree of personal interface.

95. Nevertheless, HENRY and WILLIAMS did nothing to counsel MCDONNELL regarding his conduct or attitude towards Plaintiff, did not discharge or reassign MCDONNELL, and thereby encouraged MCDONNELL to continue in his course of conduct aimed at causing injury, both physical and mental, to Plaintiff.

96. As masters, HENRY and WILLIAMS breached their duty to exercise reasonable care under the circumstances herein, to control MCDONNELL, a servant acting under their control, in order to prevent MCDONNELL from intentionally harming others and from creating an unreasonable risk of bodily harm to them.

97. At the time of the incidents alleged heretofore, MCDONNELL answered to HENRY as master. Upon information and belief, after November 1, 1986, HENRY answered to WILLIAMS as master.

98. HENRY and WILLIAMS are liable for the injuries caused by MCDONNELL under the doctrine of respondeat superior.

WHEREFORE Plaintiff demands judgment against Defendants HENRY and WILLIAMS for his damages, including pain and suffering, disability, medical expenses, lost wages, and punitive damages.

COUNT III WRONGFUL DISCHARGE
(AGAINST KEN WILLIAMS)

99. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

100. The purpose of Plaintiff's filing of a report with the Medical Department of EAL on November 6, 1986, was to establish a record of the injuries sustained during the attack by MCDONNELL for purposes of collecting worker's compensation at a later date if his injuries should become so severe that it was warranted.

101. On November 7, 1986, Plaintiff was terminated by WILLIAMS specifically on account of his having filed the report described in the paragraph above. The act by WILLIAMS of discharging Plaintiff because of his valid attempt to claim compensation under the Workers' Compensation Law is a violation of § 440.205 Fla. Stat. (1987), which states that "no employer shall discharge, threaten to discharge, intimidate or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation Law."

102. Plaintiff hereby accepts his discharge as final but only to the extent that, but for the wrongful discharge, Plaintiff would have worked at Eastern until March 4, 1989, and the Defendants are liable for back wages and benefits up until that time.

103. Pursuant to § 448.08 Fla. Stat. (1987), this court may award to the Plaintiff costs of the action and a reasonable attorney's fee for having to bring this action for unpaid wages due to the wrongful

discharge.

WHEREFORE Plaintiff requests restitution for all wages and other perquisites of employment that he would have received but for the wrongful discharge by Defendant WILLIAMS.

COUNT IV - NEGLIGENCE PER SE
UNFAIR LABOR PRACTICES
(AGAINST MCDONNELL, HENRY and WILLIAMS)

104. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

105. In Florida union members and representatives are protected under §§ 447.01 et. seq. Fla. Stat. (1987) and under the Railway Labor Act 45 U.S.C.A. §§ 151 et. seq. (West 1972).

106. Plaintiff was a member and representative of the IAMAW, which belongs to the class the RLA and §§ 447.01 et. seq. are intended to protect.

107. The RLA and §§ 447.01 et. seq. Fla. Stat. are intended to protect against the type of harassment, coercion and subju-gation which the Plaintiff was subjected to by the Defendants.

108. First, Defendant MCDONNELL violated 45 U.S.C.A. § 152 (Third) (West 1972) of the Railway Labor Act and § 447.09(2) Fla. Stat. (1987). By attempting to coerce and influence mechanics in the GSE shop prior to the election of Plaintiff as shop steward, MCDONNELL tried to prevent Plaintiff's election as shop steward.

109. Second, Defendants MCDONNELL, HENRY, and WILLIAMS violated, 45 U.S.C.A. §§ 152 (First and Second) (West 1972) and § 447.09(11) Fla. Stat. (1987) by failing to exert every reasonable effort to make and maintain the agreement (between the IAMAW and the EAL) and to settle all disputes in an expeditious manner.

110. Third, Defendants MCDONNELL, HENRY, and WILLIAMS violated 45 U.S.C.A. § 152 (Third) (West 1972) of the Railway Labor Act and § 447.09(11) Fla. Stat. (1987) by refusing to allow the Plaintiff access to the employees that elected him after he

(the Plaintiff) was terminated. The Railway Labor Act clearly states that, "Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier...." Since employment with the company (EAL) is not a prerequisite to be a representative, Plaintiff's rights were abridged when Defendants refused to allow the Plaintiff back on base - after he was terminated - to continue to represent the employees that elected him.

111. Defendants intentionally and maliciously breached their duty to the Plaintiff under conduct proscribed by the RLA and the Florida Statutes. As a proximate result thereof the Plaintiff suffered mental and physical anguish, loss of wages and benefits.

112. Defendants were conspirators in an intentional and malevolent plan to concentrate termination efforts on the front line leadership of the IAMAW, the shop stewards. As a proximate result thereof, the prospective advantage of the Plaintiff was considerably diminished.

WHEREFORE, Plaintiff demands judgment against Defendants MCDONNELL, HENRY, and WILLIAMS, compensatory fines as specified in 45 U.S.C.A. § 152 (Tenth) (West 1972) of the Railway Labor Act and § 447.14 Fla. Stat. (1987), compensation for lost wages and benefits, and punitive damages such as the Court may deem reasonable.

COUNT V
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(AGAINST MCDONNELL, HENRY, and WILLIAMS)

113. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

114. Plaintiff was employed at EAL from 1976 until 1986, and received numerous commendation letters and references. The constructive discharge conspired by the Defendants without legal cause, after many years of dedicated employment offends the implied-in-law covenant of good faith and fair dealing contained in

all contracts.

WHEREFORE, Plaintiff demands judgment against Defendants MCDONNELL, HENRY, and WILLIAMS for all the wages that he would have received but for their tortious actions, including pension benefits, welfare and health benefits, perquisites of employment and interest, and punitive damages.

COUNT VI - BREACH OF CONTRACT
(AGAINST MCDONNELL, HENRY, and WILLIAMS)

115. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

116. Plaintiff was fired without the required investigation stated on page 105 (Appendix 14) of the "Agreement" between the IAMAW and Plaintiff's employer.

117. Plaintiff was fired without a complete review of prior performance and work history.

118. The letters issued by Defendant MCDONNELL to the Plaintiff on April 14, 1986 and on October 23, 1986; and the letter issued by HENRY on November 27, 1984, were direct violations of Article 18 of the "Agreement" between the IAMAW and EAL which states that no employee shall be disciplined without first being advised in writing of the charge, not later than five days from the time of the incident.

119. The placing of a disciplinary letter in the Plaintiff's personnel file, by HENRY (see ¶ 10), without notice to the Plaintiff, violated Plaintiff's right to due process guaranteed under Article 17 et. seq. of the "Agreement."

120. The reference by MCDONNELL (¶ 19) to the "memo" placed in the Plaintiff's personnel file without notice to the Plaintiff, violated Plaintiff's right to due process guaranteed under Article 17 et. seq. of the "Agreement."

121. Defendants MCDONNELL, HENRY, and WILLIAMS have violated the preamble of the "Agreement" between the IAMAW and EAL which states, "No employee covered by this Agreement will

be interfered with, restrained, coerced, or discriminated against by the Company, its officers or agent, because of membership in or lawful activity permitted under the Railway Labor Act...on behalf of the Union."

122. Plaintiff was threatened by Defendants MCDONNELL, HENRY and WILLIAMS for filing PDORs and making other safety complaints and/or attempting to fix equipment properly instead of "rigging" it.

123. The threats above were in direct violation of numerous missives sent by EAL to its employees concerning "quality work", and Eastern Air Line Standard Practice § 52-1501.

124. Where an employer commits violations of its own firing policies and/or fails to review prior performance and work history of an employee targeted for termination, negligence lies.

WHEREFORE, Plaintiff demands judgment against Defendants MCDONNELL, HENRY, and WILLIAMS for all the wages that he would have received but for their intentional and malicious actions, including pension benefits, welfare and health benefits, perquisites of employment and interest, and punitive damages.

COUNT VII
FAILURE TO PROTECT EVIDENCE FOR PLAINTIFF'S BENEFIT
(AGAINST MCDONNELL and HENRY)

125. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

126. When Plaintiff filed grievances, Defendant's were under a duty to retain and protect any evidence pertaining to said grievance which would foreseeably involve facts under dispute.

127. Defendants have failed to retain and protect evidence which would have benefited the grievant-Plaintiff. For example the Defendants stated that they no longer had in their possession the GEARS for forklift #4649 at the SBA arbitration on April 12, 1988.

128. As a proximate result of Defendants' intentional and malicious actions the Plaintiff's prospective bargaining advantage was severely hampered.

WHEREFORE Plaintiff requests that this Court grant relief and damages for any instances herein alleged or any instances which may occur during ensuing discovery proceedings, where the Defendants have withheld or failed to protect evidence beneficial to the Plaintiff.

COUNT VIII - MALICIOUS PROSECUTION
(AGAINST MCDONNELL, HENRY AND WILLIAMS)

129. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

130. MCDONNELL harassed the Plaintiff and singled him out for discipline. (An affidavit from R.D. Wellbaum is incorporated by reference as Exhibit "G".)

131. Defendants MCDONNELL, HENRY and WILLIAMS have subjected the Plaintiff to malicious prosecution in that:

a) HENRY has commenced several disciplinary letters against the Plaintiff, MCDONNELL has commenced several disciplinary letters against the Plaintiff and given the Plaintiff time off, and WILLIAMS terminated the Plaintiff;

b) the majority of these disciplinary actions have been or will be terminated and adjudicated in favor of the Plaintiff;

c) all disciplinary actions metered to the Plaintiff by the Defendants were devoid of probable cause;

d) all three of the Defendants, through their actions and their words, have demonstrated malice toward the Plaintiff; and

e) the Plaintiff has been damaged physically, monetarily, and mentally by the prosecutions of the defendants.

WHEREFORE the Plaintiff demands judgment against Defendants MCDONNELL, HENRY and WILLIAMS, jointly and severally, for all damages suffered by the Plaintiff including pain and suffering for his physical injuries, the value of wages lost, and future wages lost, interest, legal and attorneys' fees.

COUNT IX - CONSPIRACY
(AGAINST MCDONNELL, HENRY and WILLIAMS)

132. Plaintiff re-alleges paragraphs 1 through 81 and further alleges:

133. Defendants MCDONNELL, HENRY, and WILLIAMS conspired between them to deprive Plaintiff of his employment and to cause him physical injury and emotional distress.

134. The Defendants are jointly and severally liable for the Plaintiff's injuries and damages.

WHEREFORE the Plaintiff demands judgment against Defendants MCDONNELL, HENRY and WILLIAMS, jointly and severally, for all damages suffered by the Plaintiff including pain and suffering for his physical injuries, the value of wages lost, and future wages lost, interest, legal and attorneys' fees.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

BRUCE RICHARD TOSKI,
Plaintiff,

v.

CASE NO. 91-112-CIV-DAVIS
MAGISTRATE TURNOFF

WILLIAM J. McDONNELL
JEFF HENRY, AND
KEN WILLIAMS,
Defendants.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT & RECOMMENDATION

Before the Court is Defendants' Motion for Summary Judgment (D.E. 97). This matter was referred to Magistrate Judge William C. Turnoff for report and recommendation.

The Court adopts the Report and Recommendation of the Magistrate Judge in its entirety. For the reasons stated by the Magistrate Judge, and after independent review of the record, the Objections of the Plaintiff and the Defendants' response to the Objections, it is

ORDERED AND ADJUDGED that the Defendants' Motion for Summary Judgment is GRANTED. All pending motions not otherwise ruled upon are DENIED as MOOT. The case is CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of January, 1994.

_____
EDWARD B. DAVIS
UNITED STATES DISTRICT JUDGE

cc: Bruce Richard Toski
Donald Blackwell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

BRUCE RICHARD TOSKI,
Plaintiff,

v.

WILLIAM J. MCDONNELL, JEFFERSON H. HENRY, and KENDALL G. WILLIAMS,
Defendants.

Case No. 91-0112-CIV-DAVIS

NOTICE OF APPEAL

Notice is hereby given that BRUCE RICHARD TOSKI, plaintiff above named, pro-se and forma pauperis, appeals to the United States Court of Appeals for the 11th Circuit, from the ORDER granting the defendants' Motion for Summary Judgment, entered in this action on the 31st day of January, 1994.

Respectfully submitted,

/s/ _____

Bruce Toski - Plaintiff, pro se
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4246
Non-Argument Calendar

D.C. Docket No. 91-112-CIV-EBD

[DO NOT PUBLISH]

BRUCE RICHARD TOSKI,
Plaintiff,-Appellant,

versus

WILLIAM J. McDONNELL,
JEFF HENRY,
KEN WILLIAMS,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

(December 10, 1996)

Before BIRCH, DUBINA, and CARNES, Circuit Judges

PER CURIAM:

Appellant Bruce Richard Toski ("Toski") appeals from the district court's grant of summary judgment in favor of the defendants and against Toski regarding his pro se claims brought under the

Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-163, 181-88, and his supplemental state common law claims, 28 U.S.C. § 1367, arising out of his employment with and discharge by Eastern Airlines.

Our review of the record persuades us that each of the arguments Toski makes concerning his procedural challenges to various orders of the district court and his arguments relative to the district court's grant of summary judgment for the defendants are meritless. Accordingly, we affirm the district court's procedural orders and the grant of summary judgment in favor of the defendants and against Toski.

AFFIRMED.[1]

---

[1] We also deny all pending motions in this case

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 94-4246

BRUCE RICHARD TOSKI,
Petitioner / Appellant,

v.

WILLIAM J. MCDONNELL,
JEFFERSON H. HENRY and
KENDALL G. WILLIAMS,
Defendants / Appellees

On Appeal from an Order (December 10th, 1996) of the Eleventh Circuit affirming a Final Order from the U.S. District Court for the Southern District of Florida granting Summary Judgment in a Civil Case

---

SUGGESTION OF REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for appellant Bruce Richard Toski, certifies that the following is a complete list of the trial judges, all attorneys, persons, associations of person, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

1. Anania, Bandklayder & Blackwell - attorneys for the appellees
2. Anania, Francis A. - attorney / appellees
3. Blackwell, Donald A. - attorney for appellees
4. Davis, Edward B. - United States District Court Judge
5. Eastern Air Lines - Assisting defense counsel
6. Friedman, Jonathan S. - Counsel *pro hac vice* for Appellant
7. Henry, Jefferson H. - Defendant
8. Hite, M. Catherine - attorney for appellees
9. McDonnell, William J. - Defendant
10. O'Brien, Richard F. - attorney for appellees
11. Toski, Bruce Richard - Plaintiff
12. Turnoff, William C. - United States District Court Magistrate
13. Williams, Kendall G. - Defendant

VERIFIED STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following *unanimous* decision of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court.

See: Hawaiian Airlines, Inc. v. Grant T. Norris (No. 92-2058), 512 U.S.___ , 129 L.Ed.2d 203, 114 S.Ct. 2239 (1994).

Attorney *pro hac vice* for appellant

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TABLE OF CONTENTS

ARGUMENT AND AUTHORITY..... 5,6,7,8
CERTIFICATE OF INTERESTED PERSONS.C1
CERTIFICATE OF SERVICE..... 9
CONCLUSION..... 9
FACTS, STATEMENT OF..... 3,4
ISSUE, STATEMENT OF..... 1
PROCEDURAL HISTORY..... 2
VERIFIED STATEMENT FROM COUNSEL..V1

CITATIONS

CASES

Hawaiian Airlines, Inc. v. Grant T. Norris
(No. 92-2058) (1994).....V-1,5-9

Hawaiian Airlines, Inc. v. Grant T. Norris
74 Haw 648, 847 P.2d 634(1993)..... 7

Lingle v. Norge Div. of Magic Chef, Inc.
486 US 399(1988).....6,7,8

STATUTES

45 U.S.C. §151, *et seq.* (RLA).....2,6,7

STATEMENT OF THE ISSUE

THE DISTRICT COURT ERRED IN APPLYING THE LAW AND THE FACTS WHEN IT RULED THAT PLAINTIFF'S FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES UNDER THE COLLECTIVE BARGAINING AGREEMENT BARRED ALL OF HIS CLAIMS. IN FACT, THE PLAINTIFF HAD EXHAUSTED HIS ADMINISTRATIVE REMEDIES, NOTWITHSTANDING THAT NEITHER EXHAUSTION NOR COMMENCEMENT WAS REQUIRED PRIOR TO FILING A LAWSUIT AGAINST THE DEFENDANTS FOR EIGHT (8) COUNTS OF VARIOUS CLAIMS BASED, IN PRINCIPAL, ON STATE LAW.

PROCEDURAL HISTORY

Appellant, acting *pro-se*, filed suit against the defendants[1] in Dade County Circuit Court under Case #90-51972-CA-01 on October 23, 1990. The case was removed to federal court based on partial reference to federal labor law in Count IV. Plaintiff's nine (9) count complaint survived a Motion to Dismiss with the court only striking Count VIII and part of Count I. After denying the appellant an opportunity to amend his initial complaint, the district court granted the defendants' motion for summary judgment on January 31, 1994. The court found that the plaintiff failed to exhaust available administrative remedies and that his claims were pre-empted by the Railway Labor Act (RLA) 45 U.S.C. §151, *et seq.*

Appellant filed a timely appeal to the Eleventh Circuit Court of

---

[1] The defendants were acting as plaintiff's supervisors at Eastern Air Lines (EAL). EAL was sued separately in the Bankruptcy Court of New York and is *not* a party herein.

Appeals, which, on December 10th, 1996, affirmed the district court's granting of summary judgment in favor of the defendants.

On December 30, 1996, appellant retained counsel *pro hac vice* in order to assert his suggestion for a rehearing *en banc*.

STATEMENT OF NECESSARY FACTS

When defendant Williams issued a termination letter to the plaintiff on November 7th, 1986, the plaintiff was forced to leave his role as a mechanic and Shop Steward at Eastern Air Lines. Plaintiff's meritorious ten (10) years of service at Eastern Air Lines came to an abrupt end. Defendant Williams, who was acting as the plaintiff's manager, terminated the plaintiff for alleged insubordination and for filing a worker's compensation claim documenting a battery on the plaintiff by defendant McDonnell. On October 24th, 1986 Defendant McDonnell, while acting as plaintiff's supervisor, attacked the plaintiff in the men's room of the Ground Service Equipment (GSE) shop at EAL in an attempt to serve a disciplinary letter on the plaintiff. Said letter stemmed from plaintiff's refusal to perform an unsafe repair - ordered by defendant McDonnell - on ground equipment owned by EAL. Defendant Henry, in his capacity as a GSE foreman at EAL, conspired with defendants Williams and McDonnell to deprive the plaintiff of his gainful employment at EAL. But for the tortious actions of the defendants, plaintiff would have been employed for approximately three (3) more years at EAL.

Plaintiff, in compliance with the procedures set forth in the Collective Bargaining Agreement (CBA) agreed upon between the International Association of Machinist (IAM) and EAL, filed a timely grievance to appeal disciplinary letters and his termination to the System Board of Adjustment. The termination grievance never went before an arbitration tribunal due to a huge backlog of pending grievances, lengthy delays in the arbitral process, appeals,

and the stay on litigation placed by EAL' bankruptcy petition filing in 1989.

ARGUMENT AND AUTHORITY

The decision of the Eleventh Circuit Court of Appeals in the case *sub-judice* is in direct conflict with precedent of the Supreme Court of the United States as expressed in Hawaiian Airlines, Inc. v. Grant T. Norris (No. 92-2058), 512 U.S.___ , 129 L.Ed.2d 203, 114 S.Ct. 2239 (1994). Unfortunately, in the case at bar, the district court did not have the benefit of the U.S. Supreme Court's ruling in Norris which was decided subsequent to the district court granting summary judgment. This important case should be considered and applied by this court to prevent a breach of the appellant's substantive right to a trial by jury.

In Norris, an airline mechanic working at Hawaiian Air Lines (HAL) was also terminated for alleged insubordination and refusing to perform an unsafe repair. Norris appealed his termination according to CBA procedures, but abandoned the grievance procedures after HAL offered to return Norris to work without backpay. Norris subsequently filed suit against HAL in Hawaii circuit court, alleging two wrongful discharge torts - discharge in violation of public policy and discharge in violation of Hawaii's Whistleblower Protection Act. Id at 3. Norris also alleged that HAL had breached the CBA. As in the case at bar, Norris's action was removed to federal district court. Norris's claim for breach of the CBA and his claim for discharge in violation of public policy were subsequently dismissed, as being pre-empted by the RLA. In the meantime Norris had filed a second lawsuit in state court against three (3) of HAL's officers who allegedly directed, confirmed or ratified the retaliatory discharge. He again sought relief for discharge in violation of public policy and the Whitleblower's Act. The Hawaii trial court dismissed the two

counts as pre-empted by the RLA. Id at 4. The Supreme Court of Hawaii reversed in both cases, concluding that the RLA did not pre-empt respondent's state tort claims. Id at 4. The court pointed to Lingle v. Norge Div. of Magic Chef, Inc. 486 US 399, 108 S.Ct.1877 (1988), which held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective-bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Norris at 4. The Supreme Court adopted the Lingle standard, Norris at 14, and held:

> ". . .(W)e agree with the Supreme Court of Hawaii that (Norris's) claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment." Id at 17.

In the case at bar the district court granted summary the defendants' motion for summary judgment based on the alleged failure of the plaintiff to exhaust his administrative remedies. (R6-174, p.5). These issues are addressed in Norris , which is controlling and on point, factually and legally, with the case *sub judice*. Grant T. Norris, ***like the appellant herein***, was a mechanic for a major airline and terminated for alleged insubordination in violation of a collective bargaining agreement (CBA). Norris, ***like the appellant herein***, appealed his termination under the CBA grievance procedures, and subsequent to his arbitration hearing, filed separate actions in state court against the airline carrier and its officers. As in the case *sub judice*, the trial court ruled that mechanic Norris's claims were pre-empted by the Railway Labor Act (RLA). On appeal the Supreme Court of Hawaii, reversing , expressed the view that mechanic Norris's state tort claims were ***not*** pre-empted by the RLA. *See* Norris 74 Haw 648, 847 P.2d 634 (1993). On certiorari, the United States Supreme Court

affirmed. In an opinion by Blackmun, J., expressing the **unanimous** view of the court, it was held that the RLA did not pre-empt Norris's state law causes of action, and thus Norris was *not* required to seek redress solely through the RLA's arbitral mechanism. Like Norris, the appellant's claims are based primarily upon state law. Further, the appellant's claims, e.g. Battery, Negligent Retention, etc., do not require interpretation of a collective bargaining agreement, but instead depend upon purely factual questions concerning the appellant's conduct and the defendants' motives.

In Norris the Supreme Court relied on Lingle v. Norge Div. of Magic Chef, Inc. 486 US 399, 108 S.Ct.1877 (1988). Lingle, also, is *on point* and relevant. In Lingle, the plaintiff - as in the case *sub-judice* - was terminated for allegedly filing a false worker' compensation claim. In Lingle , the plaintiff - as in the case *sub-judice* - filed a grievance to contest her discharge. In Lingle , the plaintiff's claims, as in the case *sub-judice,* were filed in state court while her grievance was pending. Her complaint was *also* dismissed under the same pre-emption argument asserted by the defendants herein. The Supreme Court stated that state claims are pre-empted only if the plaintiffs claims can be decided solely through interpretation of the CBA. Id at 1885. In the case at bar, most, if not all, of appellant's claims can be decided independent of interpretation of the collective bargaining agreement. Thus, as stated in Lingle and Norris, appellant's claims are not pre-empted by failure to exhaust any administrative remedy or the RLA.

CONCLUSION

It is proper for this court to review its Order filed on December 10th, 1996, wherein this court affirmed the district court's granting of summary judgment in favor of the defendants. Remand to the district court would prevent a precedent setting error which would directly conflict with Norris.

Respectfully submitted this 31st day of December, 1996.

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By: _____
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-4246

BRUCE RICHARD TOSKI,

Plaintiff,-Appellant,

versus

[Stamped 02/26/97 by Clerk]

WILLIAM J. McDONNELL,
JEFF HENRY, KEN WILLIAMS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING EN BANC

Before BIRCH, DUBINA, and CARNES, Circuit Judges
PER CURIAM:
The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ (Joel F. Dubina)
UNITED STATES CIRCUIT JUDGE

TITLE 45 - RAILROADS

CHAPTER 8. RAILWAY LABOR

GENERAL PROVISIONS

45 USCS @ 152 (1990)

*** THIS SECTION IS CURRENT THROUGH 101 P.L. 507, APPROVED 11/05/90 ***

@ 152. General duties

First. Duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the

designation of representatives by the other and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining freedom from interference by carrier assistance in organizing or maintaining organization by carrier forbidden deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring

with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization and if any such contract has been enforced prior to the effective date of this Act [enacted May 20, 1926], then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives time place private agreements. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: Provided, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: And provided further, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules or working conditions contrary to agreement or to section 156 forbidden. No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 USCS @ 156].

Eighth. Notices of manner of settlement of disputes posting. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives designation by Mediation Board secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes

of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth, Violations prosecutions and penalties. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $ 1,000 nor more than $ 20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations

thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements check-off. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted-

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership,

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft

or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties), uniformly required as a condition of acquiring or retaining membership, Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, first (h) of this act [45 USCS @ 153(h), First division] defining the jurisdictional scope of the first division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the

effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs fourth and fifth of section 2 of this act [this section] in conflict herewith are to the extent of such conflict amended.

HISTORY: (May 20, 1926, ch 347, Title I, @ 2, in part, 44 Stat. 577 June 21, 1934, ch 691, @ 2, in part, 48 Stat. 1186 Apr. 10, 1936, ch 166, 49 Stat. 1189 Jan. 10, 1951, ch 1220, 64 Stat. 1238.)

HISTORY ANCILLARY LAWS AND DIRECTIVES

"This Act", referred to in this section, is Act May 20, 1926, ch 347, 44 Stat. 577, as amended, popularly known as the Railway Labor Act, which appears generally at 45 USCS @@ 151 et seq. For full classification of this Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed words "United States attorney" are inserted in this section on authority of Act June 25, 1948, ch 646, @ 1, 62 Stat. 909, which in essence changed the name of district attorneys to United States attorneys. For explanation, see Prior law and revision note to 28 USCS @ 541.

Amendments:

1934. Act June 21, 1934, substituted "by the carrier or carriers" for "by the carriers" in para. "Second", reworded paras. "Third", "Fourth" and "Fifth" generally, and added paras. "Sixth" to "Tenth".

1951. Act Jan. 10, 1951, added para. "Eleventh".

Redesignation:

This section, enacted as @ 2 of Act May 20, 1926, was redesignated as Title I, @ 152, of such Act by Act Apr. 10, 1936, ch 166, 49 Stat. 1189.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 92–2058

HAWAIIAN AIRLINES, INC.,
PETITIONER
v.
GRANT T. NORRIS

PAUL J. FINAZZO, HOWARD OGDEN, HATSUO HONMA,
PETITIONERS
v.
GRANT T. NORRIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

[June 20, 1994]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case involves the scope of federal pre-emption under the Railway Labor Act (RLA), 45 U. S. C. §151 *et seq.* The RLA, which was extended in 1936 to cover the airline industry, see Act of Apr. 10, 1936, ch. 66, 49 Stat. 1189; 49 U. S. C. §§181–188, sets up a mandatory arbitral mechanism to handle disputes "growing out of grievances or out of the interpretation and application of agreements concerning rates of pay, rules, or working conditions," 45 U. S. C. §153 First (i). The question in this case is whether an aircraft mechanic who claims that he was discharged for refusing to certify the safety of a plane that he

considered unsafe and for reporting his safety concerns to the Federal Aviation Administration may pursue available state law remedies for wrongful discharge, or whether he may seek redress only through the RLA's arbitral mechanism. We hold that the RLA does not pre-empt his state law causes of action.

I

Respondent Grant Norris is an aircraft mechanic licensed by the Federal Aviation Administration (FAA). His aircraft mechanic's license authorizes him to approve an airplane and return it to service after he has made, supervised, or inspected certain repairs performed on that plane. See Certification: Airmen Other Than Flight Crewmembers, 14 CFR §§65.85 and 65.87 (1987). If he were to approve any aircraft on which the repairs did not conform to FAA safety regulations, the FAA could suspend or revoke his license. See Maintenance, Preventive Maintenance, Rebuilding and Alteration, 14 CFR §43.12 (1992).

On February 2, 1987, respondent was hired by petitioner Hawaiian Airlines, Inc. (HAL). Many of the terms of his employment were governed by a collective-bargaining agreement (CBA) negotiated between the carrier and the International Association of Machinists and Aerospace Workers. Under the CBA, respondent's duties included inspecting and repairing all parts of a plane and its engine. On July 15, 1987, during a routine preflight inspection of a DC-9 plane, he noticed that one of the tires was worn. When he removed the wheel, respondent discovered that the axle sleeve, which should have been mirror-smooth, was scarred and grooved. This damaged sleeve could cause the landing gear to fail. Respondent recommended that the sleeve be replaced, but his supervisor ordered that it be sanded and returned to the plane. This was done, and the plane flew as scheduled. At the end of the shift, respondent refused to sign the maintenance record to certify that the repair had been performed satisfactorily and that the airplane was fit to fly. See 14 CFR 43.9(a) (1992). The supervisor immediately suspended him pending a termination hearing. Respondent

immediately went home and called the FAA to report the problem with the sleeve.[1]

Respondent then invoked the grievance procedure outlined in the CBA, and a "Step 1" grievance hearing was held on July 31, 1987. Petitioner HAL accused respondent of insubordination, claiming that his refusal to sign the record violated the CBA's provision that an aircraft mechanic "may be required to sign work records in connection with the work he performs." Respondent relied on the CBA's guarantees that an employee may not be discharged without just cause and may not be disciplined for refusing to perform work that is in violation of health or safety laws. The hearing officer terminated respondent for insubordination.

Still conforming to the CBA procedures, respondent appealed his termination, seeking a "Step 3" grievance hearing. Before this hearing took place, HAL offered to reduce respondent's punishment to suspension without pay, but warned him that "any further instance of failure to perform [his] duties in a responsible manner" could result in discharge. Respondent did not respond to this offer, nor, apparently, did he take further steps to pursue his grievance through the CBA procedures.

On December 18, 1987, respondent filed suit against HAL in Hawaii circuit court. His complaint included two wrongful discharge torts - discharge in violation of the public policy expressed in the Federal Aviation Act and implementing regulations, and discharge in violation of Hawaii's Whistleblower Protection Act, Haw. Rev. Stat. §§378–61 to 378–69 (1988).[2] He

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[1]In response, the FAA initiated a comprehensive investigation, proposed a civil penalty of $964,000 against HAL, proposed the revocation of the license of the supervisor who terminated respondent, and ultimately settled all charges for a substantial fine.

[2]The Hawaii Whistleblower Protection Act forbids an employer to "discharge, threaten, or otherwise discriminate against an employee . . .
because . . . [t]he employee . . . reports or is about to report to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to law of this State, a political subdivision of this State, or the United States, unless the employee

also alleged that HAL had breached the collective-bargaining agreement. HAL removed the action to the United States District Court for the District of Hawaii, which dismissed the breach of contract claim as pre-empted by the RLA, and remanded the other claims to the state trial court. The trial court then dismissed respondent's claim of discharge in violation of public policy, holding that it, too, was pre-empted by the RLA's provision of exclusive arbitral procedures. The state court certified its order as final to permit respondent to take an immediate appeal.

In the meantime, respondent had filed a second lawsuit in state court, naming as defendants three of HAL's officers who allegedly directed, confirmed, or ratified the claimed retaliatory discharge.[3] He again sought relief for, among other things, discharge in violation of public policy and of the Hawaii Whistleblower's Protection Act. The Hawaii trial court dismissed these two counts as pre-empted by the RLA and certified the case for immediate appeal.

The Supreme Court of Hawaii reversed in both cases, concluding that the RLA did not pre-empt respondent's state tort actions. *Norris* v. *Finazzo*, 74 Haw. 235, 842 P. 2d 634 (1992); *Norris* v. *Hawaiian Airlines, Inc.*, 74 Haw. 648, 847 P. 2d 634 (1993). That court concluded that the plain language of §153 First (i) does not support pre-emption of disputes independent of a labor agreement, 74 Haw., at 251, 842 P. 2d, at 642, and interpreted the opinion in *Consolidated Rail Corp.* v. *Railway Labor Executives' Assn.*, 491 U. S. 299 (1989), to limit RLA pre-emption to "disputes involving contractually defined rights." 74 Haw., at 250, 842 P. 2d, at 642. The court rejected petitioners' argument that the retaliatory discharge claims were pre-empted because determining whether HAL discharged respondent for insubordination, and thus for just

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knows that the report is false." §378–62(1). The Act authorizes an employee to file a civil action seeking injunctive relief and actual damages. §378–63(a).

[3]These managerial officers, petitioners here, are Paul J. Finazzo, Howard E. Ogden, and Hatsuo Honma.

cause, required construing the CBA. The court pointed to *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399 (1988), a case involving § 301 of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. §185, in which the Court held that a claim of wrongful termination in retaliation for filing a state worker's compensation claim did not require interpretation of a collective-bargaining agreement, but depended upon purely factual questions concerning the employee's conduct and the employer's motive. Because the same was true in this case, said the Supreme Court of Hawaii, respondent's state tort claims were not pre-empted.

We granted certiorari in these consolidated cases, ___ U. S. ___ (1994).

II

A

Whether federal law pre-empts a state law establishing a cause of action is a question of congressional intent. See *Allis-Chalmers* v. *Lueck*, 471 U. S. 202, 208 (1985). Pre-emption of employment standards "within the traditional police power of the State" "should not be lightly inferred." *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 21 (1987); see also *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985) (a federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress").

Congress' purpose in passing the RLA was to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 562 (1987); see also 45 U. S. C. §151a. To realize this goal, the Act establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes. 45 U. S. C. §151a. The first class, those concerning "rates of pay, rules or working conditions," *ibid.*, are deemed "major" disputes. Major disputes relate to " `the formation

of collective bargaining agreements or efforts to secure them.'" *Consolidated Rail Corp.* v. *Railway Labor Executives' Assn.*, 491 U. S. 299, 302 (1989) ("*Conrail*"), quoting *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 723 (1945). The second class of disputes, known as "minor" disputes, "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U. S. C. §151a. Minor disputes "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30, 33 (1957). Thus, "major disputes seek to create contractual rights, minor disputes to enforce them." *Conrail*, 491 U. S., at 302, citing *Burley*, 325 U. S., at 723.

Petitioners contend that the conflict over respondent's firing is a minor dispute. If so, it must be resolved only through the RLA mechanisms, including the carrier's internal dispute-resolution processes and an adjustment board established by the employer and the unions. See 45 U. S. C. §184; *Buell*, 480 U. S., at 563; *Conrail*, 491 U. S., at 302. Thus, a determination that respondent's complaints constitute a minor dispute would pre-empt his state law actions.

B

The Court's inquiry into the scope of minor disputes begins, of course, with the text of the statute. Petitioners point out that the statute defines minor disputes to include "disputes growing out of grievances *or* out of the interpretation or application of [CBAs]." Petitioners argue that this disjunctive language must indicate that "grievances" means something other than labor-contract disputes, else the term "grievances" would be superfluous. Accordingly, petitioners suggest that "grievances" should be read to mean all employment-related disputes, including those based on statutory or common law. Even if we were persuaded that the word "or" carried this weight, but cf. *United States* v. *Olano*, ___ U. S. ___ (1993) (slip op. 6–7) (reading "error or defect" to create one

category of "error"), citing *United States* v. *Young*, 470 U. S. 1, 15, n. 12 (1985); *McNally* v. *United States*, 483 U. S. 350, 358–359 (1987) (second phrase in disjunctive added simply to make the meaning of the first phrase "unmistakable"), petitioners' interpretation produces an overlap not unlike the one it purports to avoid. Their expansive definition of "grievances" necessarily encompasses disputes growing out of "the interpretation or application" of CBAs. Thus, in attempting to save the term "grievances" from superfluity, petitioners would make the phrase after the "or" mere surplusage.

We think it more likely that "grievances," like disputes over "the interpretation or application" of CBAs, refers to disagreements over how to give effect to the bargained-for agreement. The use of "grievance" to refer to a claim arising out of a CBA is common in the labor-law context in general, see, *e.g.*, *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U. S. 29, 36 (1987), and it has been understood in this way in the RLA context. See H.R. Rep. No. 1944, 73d Cong., 2d Sess., 2–3 (1934) (referring to RLA settlement of "minor disputes known as `grievances,' which develop from the interpretation and/or application of the contracts between the labor unions and the carriers"). Significantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights. See, *e.g.*, NRAB Fourth Div. Award No. 4548 (1987) (function of the National Rail Adjustment Board is to decide disputes in accordance with the controlling CBA); NRAB Third Div. Award No. 24348 (1983) (issues not related to the interpretation or application of contracts are outside the Board's authority); NRAB Third Div. Award No. 19790 (1973) ("this Board lacks jurisdiction to enforce rights created by State or Federal Statutes and is limited to questions arising out of interpretations and application of Railway Labor Agreement"); *Northwest Airlines/Airline Pilots Assn., Int'l System Bd. of Adjustment*, Decision of June 28, 1972, p. 13 ("both the traditional role of the

arbitrator and admonitions of the courts require the Board to refrain from attempting to construe any of the provisions of the [RLA]"); *United Airlines, Inc.*, 48 LA 727, 733 (BNA) (1967) ("The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act").

Accordingly, we believe that the most natural reading of the term "grievances" in this context is as a synonym for disputes involving the application or interpretation of a CBA. See Webster's Third New International Dictionary 1585 (1986) (the word "or" may be used to indicate "the synonymous, equivalent, or substitutive character of two words or phrases"). Nothing in the legislative history of the RLA[4] or other sections of the statute undermines this conclusion. But even accepting that §151(a) is susceptible of more than one interpretation, no proposed interpretation demonstrates a clear and manifest congressional purpose to create a

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[4]During the debates surrounding the RLA's enactment in 1926, floor statements that, in isolation, could support a broader interpretation of "grievances" were counterbalanced by other statements—some even by the same legislators—that equated grievances with contract interpretation. Compare 67 Cong. Rec. 4517, 8807 (1926), with *id.*, at 4510, 8808. This inconclusive debate hardly calls for fashioning a broad rule of pre-emption. Moreover, in 1934 when Congress amended the RLA to make arbitration mandatory for minor disputes, the accompanying House Report stated that the bill was intended "to provide sufficient and effective means for the settlement of minor disputes known as `grievances,' which develop from the interpretation and/or application of the contracts between the labor unions and the carriers, fixing wages and working conditions." H.R. Rep. No. 1944, 73d Cong., 2d Sess., 2–3 (1934).

[5]Petitioners cite the statute's reference to the parties' general duties as including "settl[ing] all disputes, whether arising out of the application of [collective bargaining] agreements or otherwise." 45 U. S. C. §152 First. This provision, which is phrased more broadly than the operative language of §153 First (i), does not clearly refer only to minor disputes. But even if this provision is read to require parties to try to settle certain issues arising out of the employment relationship but not specifically addressed by the CBA, this does not compel the conclusion that all issues touching on the employment relationship must be resolved through arbitration or that all claims involving rights and duties that exist independent of the CBA are thereby pre-empted. Our precedents squarely reject this pervasive pre-emption.

regime that broadly pre-empts substantive protections extended by the States, independent of any negotiated labor agreement.

C

Our case law confirms that the category of minor disputes contemplated by §151(a) are those that are grounded in the collective-bargaining agreement. We have defined minor disputes as those involving the interpretation or application of existing labor agreements. See, *e.g.*, *Consolidated Rail Corp.* v. *Railway Labor Exec. Assn.*, 491 U. S. 299, 305 (1989) ("The distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]"); *Pittsburgh & Lake Erie R. Co.* v. *Railway Labor Executives' Assn.*, 491 U. S. 490, 496, n. 12 (1989) ("Minor disputes are those involving the interpretation or application of existing contracts"); *Brotherhood of R.R. Trainmen*, 353 U. S., at 33 (minor disputes are "controversies over the meaning of an existing collective bargaining agreement"); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 243 (1950) (RLA arbitral mechanism is meant to provide remedies for "adjustment of railroad-employee disputes growing out of the interpretation of existing agreements").

Moreover, we have held that the RLA's mechanism for resolving minor disputes does not pre-empt causes of action to enforce rights that are independent of the CBA. More than 60 years ago, the Court rejected a railroad's argument that the existence of the RLA arbitration scheme pre-empted a state statute regulating the number of workers required to operate certain equipment. *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249, 258 (1931) ("No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that it does not conflict with the Arkansas statutes under consideration"). Not long thereafter, the Court rejected a claim that the RLA pre-empted an order by the Illinois Commerce Commission requiring cabooses on all trains; the operative collective-bargaining agreement required cabooses only on some of the trains. *Terminal Railroad Assn. of St. Louis v.*

Brotherhood of Railroad Trainmen, 318 U. S. 1 (1943). Although the Court assumed that a railroad adjustment board would have jurisdiction under the RLA over this dispute, *id.*, at 6, it concluded that the state law was enforceable nonetheless:

> "State laws have long regulated a great variety of conditions in transportation and industry, such as sanitary facilities and conditions, safety devices and protections, purity of water supply, fire protection, and innumerable others. Any of these matters might, we suppose, be the subject of a demand by work[ers] for better protection and upon refusal might, we suppose, be the subject of a labor dispute which would have such effect on interstate commerce that federal agencies might be invoked to deal with some phase of it. . . . But it cannot be said that the minimum requirements laid down by state authority are all set aside. We hold that the enactment by Congress of the [RLA] was not a preëmption of the field of regulating working conditions themselves . . . ." *Id.*, at 6–7.

Thus, under *Norwood*, substantive protections provided by state law, independent of whatever labor agreement might govern, are not pre-empted under the RLA.

Although *Norwood* and *Terminal Railroad* involved state workplace safety laws, the Court has taken a consistent approach in the context of state actions for wrongful discharge. In *Andrews v. Louisville & N. R. Co.*, 406 U. S. 320 (1972), the Court held that a state law claim of wrongful termination was pre-empted, *not* because the RLA broadly pre-empts state law claims based on discharge or discipline, but because the employee's claim was firmly rooted in a breach of the CBA itself. He asserted no right independent of that agreement:

> "Here it is conceded by all that the *only source* of [Andrews'] right not to be discharged, and therefore to treat an alleged discharge as a "wrongful" one that entitled him to damages, is the [CBA]. . . . [T]he disagreement turns on the extent of

> [the railroad's] obligation to restore [Andrews] to his regular duties following injury in an automobile accident. The existence and extent of such an obligation in a case such as this will depend on the interpretation of the [CBA]. Thus, [Andrews'] claim, and the [railroad's] disallowance of it, stem from differing interpretations of the [CBA]. . . . His claim is therefore subject to the Act's requirement that it be submitted to the Board for adjustment." *Id.*, at 324 (emphasis added).

Here, in contrast, the CBA is not the "only source" of respondent's right not to be discharged wrongfully. In fact, the "only source" of the right respondent asserts in this action is state tort law. Wholly apart from any provision of the CBA, petitioners had a state-law obligation not to fire respondent in violation of public policy or in retaliation for whistleblowing. The parties' obligation under the RLA to arbitrate disputes arising out of the application or interpretation of the CBA did not relieve petitioners of this duty.

Atchison, T. & S. F. R. Co. v. *Buell*, 480 U. S. 557 (1987), confirms that "minor disputes" subject to RLA arbitration are those that involve duties and rights created or defined by the collective-bargaining agreement. In *Buell*, a railroad employee sought damages for workplace injuries under the Federal Employers' Liability Act (FELA), 45 U. S. C. §51 *et seq.*, which provides a remedy for a railroad worker injured through an employer's or coworker's negligence. The railroad argued that, because the alleged injury resulted from conduct that was subject to the collective-bargaining agreement, the employee's sole remedy was through RLA arbitration. The Court unanimously rejected this argument, emphasizing that the rights derived from the FELA were independent of the CBA:

> "The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages. . . . The FELA not only provides railroad workers with substantive

> protection against negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." 480 U. S., at 564–565.

It likened *Buell* to other cases in which the Court had concluded that "notwithstanding the strong policies encouraging arbitration, `different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers,'" *id.*, at 565, quoting *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 737 (1981), and distinguished it from *Andrews*, which involved a state wrongful-discharge claim "based squarely" on an alleged breach of a CBA, 480 U. S., at 566.[6]

D

The pre-emption standard that emerges from the line of cases leading to *Buell*—that a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent of the collective-bargaining agreement—is virtually

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[6]*Buell*, of course, involved possible RLA preclusion of a cause of action arising out of a *federal* statute, while this case involves RLA preemption of a cause of action arising out of *state* law and existing entirely independent of the collective bargaining agreement. That distinction does not rob *Buell* of its force in this context. See *Lingle* v. *Norge Div. of Magic Chef*, 486 U. S. 399, 412 (1988) (*Buell* principles applicable to determine whether federal labor law pre-empts a state statute). Principles of federalism demand no less caution in finding that a federal statute pre-empts state law. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S., at 21 (pre-emption of state statute "should not be lightly inferred in this [labor] area, since the establishment of labor standards falls within the traditional police powers of the State").

identical to the pre-emption standard the Court employs in cases involving §301 of the LMRA, 29 U. S. C. §185.[7] In *Allis-Chalmers* v. *Lueck*, 471 U. S. 202 (1985), the Court applied §301 pre-emption to a state-law claim for bad-faith handling of a worker's compensation claim because the duties the employer owed the employee, including the duty of good faith, were rooted firmly in the collective-bargaining agreement. Its pre-emption finding was based on the fact that "the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, [so that] any attempt to assess liability here inevitably will involve contract interpretation." *Id.*, at 218.

It cautioned, however, that other state-law rights, those that existed independent of the contract, would not be similarly pre-empted:

> "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by §301 or other provisions of the federal labor law. . . . Nor is there any suggestion that Congress, in adopting §301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. . . . Clearly, §301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the preemptive effect of §301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.*, at 211–212.[8]

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[7]Section 301(a) provides federal-court jurisdiction over controversies involving collective-bargaining agreements and "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 451 (1957).

[8]The Court applies these principles in *Livadas* v. *Aubry*, *ante*, at ___, in which we reject the claim that an employee's state-law right to receive a penalty payment from

In a case remarkably similar to the case before us now, this Court made clear that the existence of a potential CBA-based remedy did not deprive an employee of independent remedies available under state law. In *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399 (1988), an employee covered by a labor agreement was fired for filing an allegedly false worker's compensation claim. After filing a grievance pursuant to her collective-bargaining agreement, which protected employees against discharge except for "proper" or "just" cause, she filed a complaint in state court, alleging that she had been discharged for exercising her rights under Illinois worker's compensation laws. The state court had held her state-law claim pre-empted because "the same analysis of the facts" was required in both the grievance proceeding and the state-court action. This Court reversed.

It recognized that where the resolution of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted. *Id.*, at 405–406, citing *Lueck*, *supra*; *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962). It observed, however, that "purely factual questions" about an employee's conduct or an employer's conduct and motives do not "requir[e] a court to interpret any term of a collective-bargaining agreement." *Id.*, at 407. The state-law retaliatory discharge claim turned on just this sort of purely factual question: whether the employee was discharged or threatened with discharge, and, if so, whether the employer's motive in discharging him was to deter or interfere with his exercise of rights under Illinois worker's compensation law.

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her employer was pre-empted under §301 because the penalty was pegged to her wages, which were determined by the governing CBA. The Court states that "when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Ante*, at ___, citing *Lingle* v. *Norge Division of Magic Chef*, 486 U. S. 399, 413, n. 12 (1988). In addition, it reaffirms that "§301 cannot be read broadly to pre-empt non-negotiable rights conferred on individual employees as as matter of state law." *Ante*, at ___.

While recognizing that "the state-law analysis might well involve attention to the same factual considerations as the contractual determination whether Lingle was fired for just cause," *id.*, at 408, the Court disagreed that

> "such parallelism render[ed] the state-law analysis dependent upon the contractual analysis. For while there may be instances in which the National Labor Relations Act pre-empts state law on the basis of the subject matter of the law in question, §301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is `independent' of the agreement for §301 pre-emption purposes." *Id.*, at 408–409.

The Court's ruling in *Lingle* that the LMRA pre-empts state law only if a state-law claim is dependent on the interpretation of a collective-bargaining agreement is fully consistent with the holding in *Buell*, 480 U. S., at 564–565, that the RLA does not pre-empt "substantive protections . . . independent of the [CBA]," with the holding in *Terminal Railroad*, 318 U. S., at 7, that the RLA does not pre-empt basic "protections . . . laid down by state authority," with the conclusion in *Andrews*, 406 U. S., at 324, that a state-law claim is pre-empted where it "depend[s] on the interpretation" of the CBA, and with the description in *Conrail*, 491 U. S., at 305, of a minor dispute as one that can be "conclusively resolved" by reference to an existing collective-bargaining agreement. *Lingle*, in fact, expressly relied on *Buell*, see 486 U. S., at 411–412, just as earlier RLA cases have drawn analogies to LMRA principles,

see, *e.g.*, *International Assn. of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682, 692 (1963). Given this convergence in the pre-emption standards under the two statutes, we conclude that *Lingle* provides an appropriate frame-work for addressing pre-emption under the RLA, andwe adopt the *Lingle* standard to resolve claims of RLA pre-emption.[9]

E

In reaching this conclusion, we reject petitioners' suggestion that this contract-dependent standard for minor disputes is inconsistent with two of our prior cases, *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945), and *Consolidated Rail Corp.* v. *Railway Labor Exec. Assn.*, 491 U. S. 299, 302 (1989). *Burley* was not a pre-emption case. Rather, it concerned the authority of union officials to settle railroad workers' individual claims for damages for alleged violations of the collective-bargaining agreement. The railroad urged that the union representative, who had the authority to negotiate collective agreements in major disputes, enjoyed similar

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[9]It is true, as petitioners observe, that the RLA and the LMRA are not identical in language, history, and purpose. The LMRA, unlike the RLA, does not mandate arbitration, nor does it prescribe the types of disputes to be submitted to arbitration under bargaining agreements. Nonetheless, the common purposes of the two statutes, the parallel development of RLA and LMRA pre-emption law, see, *e.g.*, *International Assn. of Machinists* v. *Central Airlines*, 372 U. S. 682, 691–692 (1963); *Allis-Chalmers* v. *Lueck*, 471 U. S. 202, 210 (1985), and the desirability of having a uniform common law of labor law pre-emption, cf. *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 383–384 (1969), support the application of the *Lingle* standard in RLA cases as well.

Lower courts, too, have recognized the appropriateness of the *Lingle* standard to RLA pre-emption analysis. See, *e.g.*, *Anderson* v. *American Airlines, Inc.*, 2 F. 3d 590, 595 (CA5 1993) (applying *Lingle* to analyze RLA pre-emption); *Davies* v. *American Airlines, Inc.*, 971 F. 2d 463, 466–467 (CA10 1992) (same), cert. denied, ___ U. S. ___ (1993); *O'Brien* v. *Consolidated Rail Corp.*, 972 F. 2d 1, 4 (CA1 1992) (same), cert. denied, ___ U. S. ___ (1993); *Maher* v. *New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 472–473, 593 A. 2d 750, 758 (1991) (same). But see, *e.g.*, *Hubbard* v. *United Airlines, Inc.*, 927 F. 2d 1094, 1097 (CA9 1991) (*Lingle* does not govern in RLA cases); *Lorenz* v. *CSX Transp., Inc.*, 980 F. 2d 263, 268 (CA4 1992) (same).

authority to settle individual claims in minor disputes. In the course of rejecting this claim, the Court described minor disputes as including the "omitted case," that is, one "founded upon some incident of the employment relationship, or asserted one, independent of those covered by the collective bargaining agreement, *e.g.*, claims on account of personal injury." 325 U. S., at 723.

This language is sweeping, but its effect is limited. The conflict in *Burley*, which the parties agreed was a minor dispute, concerned the terms of a collective-bargaining agreement, and not some other "incident of the employment relationship," or any "omitted case." These references, therefore, are dicta. Moreover, even the "omitted case" dictum logically can refer to a norm that the parties have created but have omitted from the collective-bargaining agreement's *explicit* language, rather than to a norm established by a legislature or a court.[10] Finally, *Burley*'s one specific example of an "omitted case"—claims for personal injury that do not depend on the contract—was found in *Buell* to be outside the RLA's exclusive jurisdiction. Nonetheless, to avoid any confusion, we expressly disavow any language in *Burley* suggesting that minor disputes encompass state-law claims that exist independent of the collective-bargaining agreement.

Conrail, like *Burley*, involved no pre-emption analysis. The parties agreed that the dispute—a workers' challenge to the railroad's drug testing policies—was governed by the RLA, because Conrail's policy of conducting physical examinations was an implied term of the collective-bargaining agreement. 491 U. S., at

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[10]See *Detroit & Toledo Shore Line R. Co.* v. *United Transportation Union*, 396 U. S. 142, 154–155 (1969) ("Where a condition is satisfactorily tolerable to both sides, it is often *omitted* from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others") (emphasis added); *Conrail*, 491 U. S., at 311–312 (recognizing that CBAs include implied terms arising from "practice, usage and custom"); see also *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578–579 (1960) (a CBA is "more than a contract; it is a generalized code to govern a myriad of cases which the draft[ers] cannot wholly anticipate").

301. The only question before the Court was whether the employer's drug-testing policy constituted an attempt to add a new term to the existing agreement, making it a major dispute subject to a "protracted process" of bargaining and mediation, *id.*, at 303, or whether the testing reflected the employer's interpretation and application of an implied term of the existing contract, producing a minor dispute subject to a less onerous process of arbitration. We concluded that the dispute was minor, stating that "[t]he distinguishing feature of [a minor dispute] is that the dispute may be conclusively resolved by interpreting the existing [CBA]." *Id.*, at 305, citing Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 568, 576 (1937). Obviously, to say that a minor dispute can be "conclusively resolved" by interpreting the CBA is another way of saying that the dispute does not involve rights that exist independent of the CBA.

Petitioners, however, pin their hopes on the observation that "[w]here an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is *arguably justified* by the terms of the parties' collective-bargaining agreement." *Id.*, at 307 (emphasis added). They argue that this case involves a minor dispute because the termination of respondent was "arguably justified" by the CBA's provision permitting termination for "just cause." This "arguably justified" standard, however, was employed only for policing the line between major and minor disputes. Recognizing that accepting a party's characterization of a dispute as "minor" ran the risk of undercutting the RLA's prohibition "against unilateral imposition of new contractual terms," *id.*, at 306, the Court held that a dispute would be deemed minor only if there was a sincere, nonfrivolous argument that it turned on the application of the existing agreement, that is, if it was "arguably justified" by that agreement. Obviously, this test said nothing about the threshold question whether the dispute was subject to the RLA in the first place.

III

Returning to the case before us, the question under *Lingle* is whether respondent's state-law wrongful discharge claims are independent of the collective- bargaining agreement. Petitioners argue that resort to the agreement is necessary to determine whether respondent, in fact, was discharged. This argument is foreclosed by *Lingle* itself. *Lingle* teaches that the issue to be decided in this case—whether the employer's actions make out the element of discharge under Hawaii law—is a "purely factual question." 486 U. S., at 407.

Nor are we persuaded by petitioners' contention that the state tort claims require a determination whether the discharge, if any, was justified by respondent's failure to sign the maintenance record, as the agreement required him to do. Although such a determination would be required with regard to respondent's separate allegation of discharge in violation of the agreement, the District Court dismissed that count as pre-empted by the RLA, and respondent does not challenge that dismissal. The state tort claims, by contrast, require only the purely factual inquiry into any retaliatory motive of the employer.

Accordingly, we agree with the Supreme Court of Hawaii that respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment.

It is so ordered.

Accordingly, we agree with the Supreme Court of Hawaii that respondent's claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not pre-empted by the RLA, and we affirm that court's judgment.

It is so ordered.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-0112-CIV-DAVIS

BRUCE RICHARD TOSKI,
Plaintiff,

vs. REPORT and RECOMMENDATION

WILLIAM J. MCDONNELL,
JEFF HENRY, and KEN
WILLIAMS,
Defendants.
_____/

This Cause is before the undersigned upon an order of reference by United States District Judge Edward B. Davis. Presently pending before the Court is Defendants' Motion for Summary Judgment (D.E. 97). Plaintiff has filed a response (D.E. 162)[1] and Defendants have replied (undocketed) .

FACTUAL AND PROCEDURAL BACKGROUND

[1] On October 6, 1993 Judge Davis denied Plaintiff's motion to file a response brief in excess of ten pages (D.E. 158). Nevertheless, Plaintiff's brief, while reaching exactly ten pages, is printed in a typeface so small that it strains the eye to read. This creative word processing violates the spirit, if not the letter, of both the Local Rules and Judge Davis's order. Much as this Court is inclined to strike the excess portion of Plaintiff's pleading, because of the interminable delays encountered in this case the undersigned has instead read and considered it in its minuscule entirety. Plaintiff is warned that his status as a non-attorney does not give him carte blanche to disobey court orders and that such actions in the future shall not be excused.

Plaintiff brings this action alleging a wide variety of misconduct on the part of Defendants, his former supervisors at the late Eastern Air Lines [EAL] . Plaintiff was hired by EAL as a shop laborer at the Miami airport beginning in June, 1976. Plaintiff remained in EAL's employ (except for a leave of absence between August and November of 1983) until November 7, 1986 when he was dismissed. During his employment at EAL Plaintiff worked both as a stock clerk and as a mechanic. At his termination, and at the time of all the alleged wrongful acts, Plaintiff was working as a mechanic in the Ground Support Equipment Auto Shop where EAL's airport vehicles were repaired and maintained.

Each of the Defendants, at various times, supervised Plaintiff's work at EAL. Plaintiff's complaint names Defendant McDonnell as his "supervisor," Defendant Henry as his "foreman" and later as "general foreman," and Defendant Williams as his "manager."

A full recitation of the allegations detailed in Plaintiff's complaint is unnecessary for the resolution of the instant motion. Generally, however, the complaint involves a series of disciplinary actions by various of Plaintiff's supervisors beginning in 1984 and ending in Plaintiff's eventual dismissal. These disciplinary actions concern Plaintiff's job performance and certain actions deemed by his supervisors to be in violation of EAL policy and procedure.[2]

In summary, Plaintiff was accused of performing unnecessary and unauthorized work and of disobeying directives from his supervisors. In the most colorful incident, Plaintiff was asked, and refused, to remove a button from his uniform which stated "Frank is a weenie." Plaintiff later commandeered a microphone in the shop office and yelled "Frank is a weenie" over the public address system.[3] Plaintiff also alleges that Defendant McDonnell, on two occasions, physically assaulted Plaintiff.

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[2] These actions are detailed in memos attached to the complaint and Defendants' motion.

[3] The "Frank" referred to is presumably Frank Lorenzo who was, at the time of these incidents, running EAL.

Plaintiff's original complaint contained nine counts. Count VIII was dismissed by Judge Davis on November 18, 1991. See Order of Judge Davis (D.E. 21) . Also dismissed in that order was that part of Count I involving the April 11, 1986 assault because the statute of limitations had run as to the alleged incident. See Report and Recommendation of Magistrate Judge Turnoff (D.E. 20).[4] Therefore, the Complaint now contains the following eight counts:

Count I:	Battery (Defendant McDonnell) (October 24, 1986 incident only);
Count II:	Negligent Retention (Defendants Henry and Williams);
Count III:	Wrongful Discharge (Defendant Williams);
Count IV:	Negligence Per Se Unfair Labor Practice - Railway Labor Act (all defendants);
Count V:	Breach of Implied Covenant of Good Faith and Fair Dealing (all defendants);
Count VI:	Breach of Contract (all defendants);
Count VII:	Failure to Protect Evidence (all defendants);
Count IX:	Conspiracy (all defendants).

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[4] Defendants state in their motion that Count I was dismissed. This is a misstatement of Judge Davis's order which merely ratified the Report and Recommendation issued by the undersigned. That Report recommended dismissal only as outlined above, not of the entire count. Any other reading of Judge Davis's order is erroneous. Therefore, Count I as it involves the later alleged incident is still a viable claim.

ANALYSIS

I. Railway Labor Act

A. Statute of Limitations

Defendants first argue that Plaintiff's claims under the Railway Labor Act [RLA] are time-barred. In Count IV, Plaintiff alleges several violations of the Railway Labor Act: 1) failing to "make and maintain" the collective bargaining agreement; 2) failing to settle disputes in an expeditious manner; 3) refusing to allow Plaintiff access to shop employees after his termination; and 4) attempting to coerce and influence shop mechanics prior to Plaintiff's election as shop steward.

Although the RLA does not contain a specific statute of limitations, courts applying facts similar to the case at bar, and guided by the Supreme Court's decision in Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), have "borrowed" the six-month limitations period found in § 10(b) of the National Labor Relations Act. 29 U.S.C. § 160(b) . *See, e.g.,* Robinson v. Pan American World Airways, Inc., 777 F.2d 84 (2d Cir. 1985); Brock v. Republic Airlines, Inc., 776 F.2d 523 (5th Cir. 1985). If the six-month limitations period is applied, each of Plaintiff's claims under the RLA are time-barred as they indisputably arose more than six-months prior to the bringing of this suit.

The parties have not cited, and the undersigned is unaware of, any cases directly on point in this Circuit. Although the undersigned finds Defendants' arguments persuasive, this issue need not be resolved at this time. As will be discussed below, Plaintiff's failure to exhaust his remedies under the collective bargaining agreement in effect at his termination operates to bar his entire suit.

B. Failure to Exhaust Administrative Remedies

Defendants next argue that summary judgment is mandated as to Plaintiff's claims under the RLA because he has failed to exhaust the

administrative remedies provided under the collective bargaining agreement in effect at Plaintiff's termination.

All parties agree that Plaintiff was subject to the collective bargaining agreement in effect between the union and EAL. This agreement contained procedures to be followed in the event of a dispute and Plaintiff has demonstrated that he was familiar with and, on previous occasions, availed himself of these procedures. *See* Toski Deposition at 172 3, 383. Furthermore, Plaintiff concedes that he filed a grievance in relation to the acts alleged in this suit, but that he voluntarily abandoned his grievance for strategic reasons. Id. at 510-11, 5155.[5] Defendants cite this failure as case-dispositive and urge summary judgment in their favor.

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[5] At his deposition Plaintiff testified that he filed a grievance as to his discharge on November 12, 1986. He stated that no hearing was ever held on his termination grievance because he was instead pursuing an appeal from an arbitrators' decision on another grievance related to the individual letters issued prior to his discharge. Plaintiff stated that this appeal was still pending at the time EAL filed for bankruptcy. Plaintiff testified as follows:

Q: So you made a strategy decision to have the System Board of Adjustment consider you grievances on the individual letters before they considered your grievance [relating to termination], correct?

A: Exactly.

Q: And it was during the course of your appeal from the System Board of Adjustment's ruling on those earlier grievances that Eastern Air Lines filed bankruptcy?

A: Yes.

Q: Was there anything in the grievance procedure which prevented you from having the System Board of Adjustment consider the [termination] grievance at the same time that it considered the other grievances?

A: I don't believe so.

Plaintiff argues in response that he did not abandon his grievance, but that the procedure was "rendered moot" by EAL's eventual bankruptcy.[6] This argument, however, is unconvincing in light of the two years and four months between Plaintiff's filing of the termination grievance (November 12, 1986) and the date on which EAL declared bankruptcy (March 9, 1989) particularly given. Plaintiff's own admission that nothing prevented him from pursuing his grievance and his arbitration appeal simultaneously. Id.

The undersigned agrees with Defendants that Plaintiff failed to pursue the grievance procedure outlined by the collective bargaining agreement. This failure to exhaust the administrative remedies available to him prevents him from prevailing in this forum. The RLA promotes stability in labor-management relations by providing effective and efficient remedies for labor disputes, thereby protecting the transportation industry from disruption. Union P. R. Co. v. Sheehan, 439 U.S. 89 (1978). Disputes between employees and carriers arising "out of interpretation orapplication of the collective bargaining agreement [are] commonly referred to as 'minor disputes.'" Kaschak v. Consolidated Rail Corp., 707 F.2d 902, 904 (6th Cir. 1983).

When a minor dispute arises, the RLA provides initially for settlement through the contractually agreed upon grievance procedures. 45 U.S.C. ~ 152 First. The Supreme Court has held that adjustment boards have primary and exclusive jurisdiction over minor disputes. Sheehan, 439 U.S. at 93-94. A party's claims of futility in following the procedure outlined by the collective bargaining agreement are insufficient to avoid this jurisdictional rule. Le Boutillier v. Air Line Pilots Association International, 778 F.2d 883 (D.C. Cir. 1985). Thus, Plaintiff's claims under the RLA and the collective bargaining agreement (Counts IV and VI) are barred by his failure to proceed with the grievance he filed at his termination.

II. State common law claims

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[6] Plaintiff's assertion that exhaustion is not required is rejected. The cases cited are questionable at best and are nevertheless distinguished on their facts.

Plaintiff's remaining claims are all brought pursuant to state law. Defendants contend that RLA preemption, coupled with Plaintiff's failure to exhaust his administrative remedies, entitles them to summary judgment on each of these separate claims as well. Plaintiff's only response to this argument is that he did not fail to exhaust, which argument has now been rejected.

In passing the RLA, as noted above, Congress intended to minimize potential disruption to the transportation industry caused by labor disputes. This goal is accomplished by establishing arbitration procedures rather than allowing disputes to be brought initially to the courts. The arbitration provisions are mandatory, and preempt state remedies. Andrews v. Louisville & N.R. Co., 406 U.S. 320 (1972). Accordingly, it has been held that any complaint "based on a matrix of facts which are inextricably intertwined with the grievance machinery of the collective bargaining agreement and of the RLA" should be dismissed on grounds of preemption. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.) cert. *denied*, 439 U.S. 930 (1978). The undersigned finds that the claims alleged by Plaintiff meet this test and are, therefore, preempted.

In the words of one Georgia District Court which considered the same issue, RLA preemption "does not appear to be one which has been frequently dealt with" by courts in the Eleventh Circuit. Fox v. Southern R. Co., 764 F. Supp. 644 (N.D. Ga. 1991). Nevertheless, instruction can be drawn from courts in other jurisdictions which have considered cases involving facts similar to those presented by the instant case.

In Fox, the court concluded that the plaintiff's libel claim was preempted by the RLA because the allegedly libelous letter was issued as part of the process mandated by the collective bargaining agreement. Id. at 650. Other courts have come to similar decisions for a wide variety of disputes which are, in varying degrees, related to the procedures under collective bargaining agreements. *See, e.g.*, Carson v. Southern Railway Co. 494 F. Supp. 1104 (D.S.C. 1979) (defamation action dismissed because claim fell within sole jurisdiction of adjustment board and "plaintiff is without an independent judicial remedy."); Majors v. U.S. Air, Inc. 525 F. Supp. 853 (D. Md. 1981) (false imprisonment and defamation claims

dismissed as preempted by RLA) ; Barchers v. Missouri P. R. Co. 669 S.W.2d 235 (Mo. Ct. App. 1984) (libel claims relating to letter submitted during investigation dismissed as preempted by RLA) .

Furthermore, it is clear that the claims alleged need not be directly related to the collective bargaining agreement process in order to be preempted. n Majors, for example, the court held tortious conduct committed in the course of a company investigation to be preempted stating: "[s]o long as his claim is founded on some incident of the employment relation, it is immaterial, for purposes of coverage by the Railway Labor Act, whether the claim is expressly covered by the collective bargaining agreement, or is independent of that agreement." Majors, 525 F. Supp. at 857.

Plaintiff's complaint alleges various state law causes of action. It is clear from the facts alleged, that Plaintiff's claims are all related to the letters of reprimand, Plaintiff's interactions with his supervisors, and his eventual dismissal from his job. Each of plaintiff's state law claims arises out of the employment relationship and each is "based on a matrix of facts which are inextricably intertwined" with the procedures of the collective bargaining agreement and the RLA. As such, these claims are preempted by the RLA and Defendants are entitled to summary judgment as a matter of law.[7]

RECOMMENDATION

Therefore, based on the foregoing, it is the RECOMMENDATION of the undersigned that Defendants' Motion for Summary Judgment (D.E. 162) be GRANTED.

Pursuant to 28 U.S.C. §636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable Edward B. Davis, United States District Judge, within ten (10) days after being served with a copy of

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[7] Therefore, it is unnecessary to address the separate arguments promoted by Defendants in favor of summary judgment on the separate state law claims.

this Report and Recommendation. See Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982). RESPECTFULLY RECOMMENDED, in Chambers, at Miami, Florida, this 9th day of November, 1993.

William C. Turnoff
United States Magistrate Judge

CC:
Honorable Edward B. Davis
Bruce Richard Toski, *pro se*
Donald Blackwell, Esquire